SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Supreme Court U. S.
FILED
MAR 13 1903
JAMES H. McKENNEY,
Clerk.

No. 220.

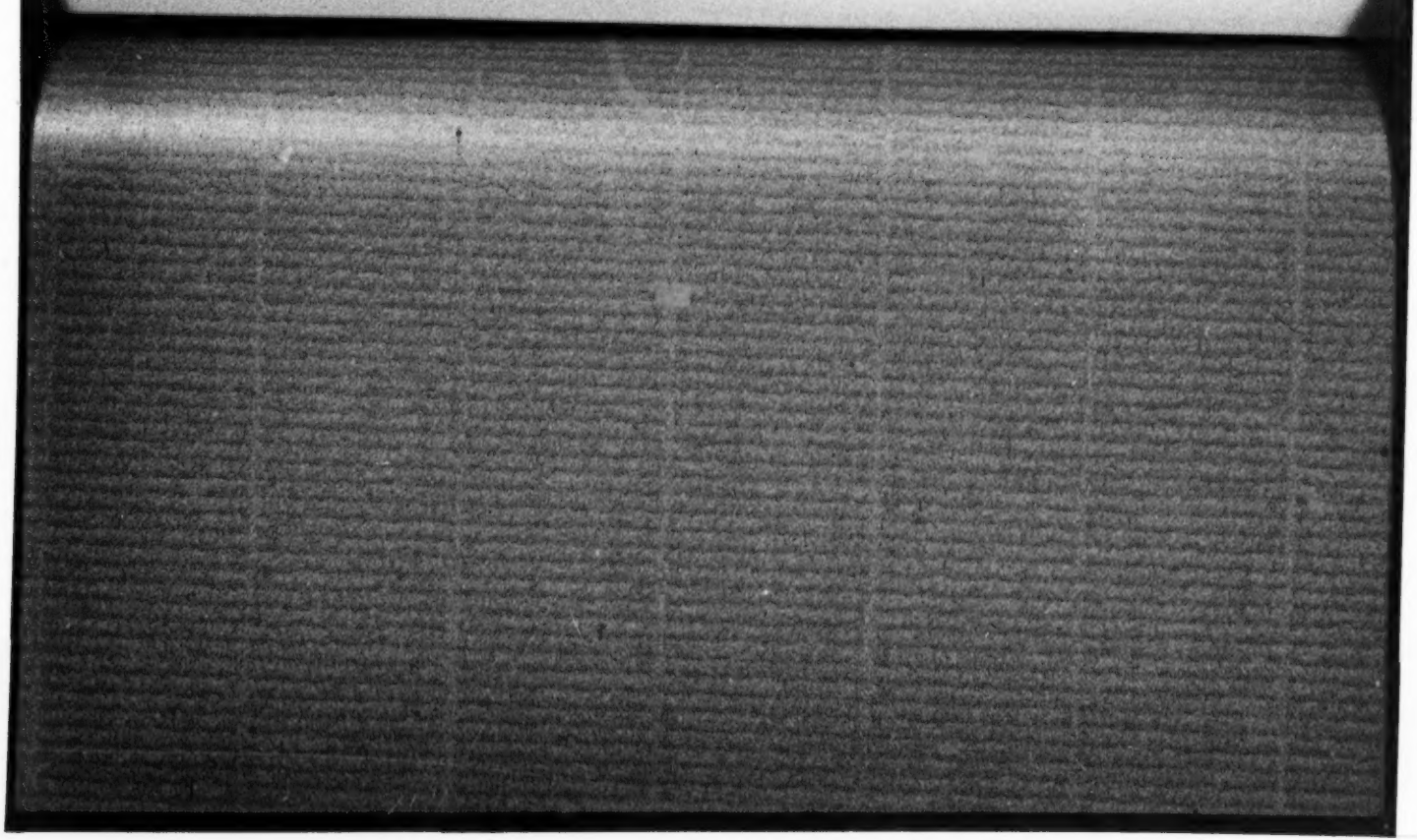
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY.

SUPPLEMENTAL BRIEF FOR THE FIDELITY AND DEPOSIT COMPANY, FOR THE CORRECTION OF CERTAIN ERRORS IN THE BRIEF FILED BY THE BUCKI COMPANY.

RICHARD H. LIGGETT,
Counsel.



SOME OF THE MISSTATEMENTS OF FACT IN THE BUCKI COMPANY'S BRIEF, POINTED OUT.

I.

THE EXCEPTIONS OF THE FIDELITY COMPANY ARE IN PROPER FORM.

The plaintiff claims that the defendant has failed to state the ground of its exception except in two instances.

This is erroneous. Every exception urged in this Court contains a statement of the ground except the twentieth, twenty-first, twenty-second (Rec., 192, 193, 194), twenty-ninth, thirtieth, thirty-first, thirty-second and thirty-third (Rec., 202, 203, 204) exceptions.

And an inspection of the record will show that the exceptions to these charges were sufficiently specific.

The twentieth exception relates to the refusal of the Court to give an instruction confining the assessment of damages to the period between October 1st and 11th, and as the instruction speaks for itself, it was unnecessary to do more than to except generally. Besides, the subject had been called to the Court's attention by a motion to strike out all the testimony relative to loss of profits, as appears from Exception 19½ (Rec., 192). This was sufficient.

Felton vs. Newport, 92 Fed. Rep., 473.

The twenty-first exception relates to the Court's charging the jury to award damages for the loss of the time of the employés. (Rec., 193, 194.) The defendant excepted to the admission of this evidence on the ground of remoteness (Rec., 184), and had moved to strike it out on five different grounds (Rec., 185, 186), and had excepted to the refusal of the motion. Surely after this it was unnecessary to do more than to except generally. If that was not sufficient, the defendant urges the thir-

teenth assignment of error relative to the admission of this evidence. (Rec., 173.)

The twenty-second exception relates to the refusal of a charge whereby the Court was requested to confine the allowance of damages to the period between October 1st and October 11th (Rec., 194). This charge spoke for itself, and the subject had been repeatedly brought to the attention of the Court.

The twenty-ninth, thirtieth, thirty-first and thirty-second exceptions related to the same subject as the preceding four exceptions, which had been excepted to on various grounds, and the Court's attention must have been fully aroused thereby. (Rec., 202.)

The thirty-third exception relates to a question of law merely, and a general exception was sufficient. (Rec., 203.)

At the foot of each specification of error there is a reference to that part of the record where the exception is stated, and inspection will show that each exception is in proper form.

II.

THE VALUE OF PLAINTIFF'S ASSETS MISREPRESENTED.

The plaintiff's brief, page 44, gives an erroneous impression, both as to the quantity and value of plaintiff's assets.

The record contains these explicit statements on that subject:

"And the evidence adduced at the trial established the following facts:

"That the plaintiff had about 3,000,000 feet of logs in its boom on Friday, October 1, 1897, * * and about 5,000,000 feet of lumber. * * That the mill was closed down from October 1st to October 11th, or seven working days, and that the plaintiff started up its mill on October 11, 1897, and ran it at full capacity until November 7, 1897, during which time it sawed up the logs levied on; and on November 12, 1897, plaintiff resumed sawing and continued until November 16, 1897, during which time it sawed up about 400,000 feet of logs, which it had purchased after October 1, 1897,

and that the mill was then closed down for want of logs to saw." (Rec., 186.)

"That prior to December 28, 1897, all of the lumber on hand October 1, 1897, and that manufactured afterwards from the logs levied on, and that manufactured from about 400,000 feet of logs subsequently purchased, was delivered by the plaintiff to the parties in New York and Boston with whom it had contracts on October 1, 1897, except a portion of old or second-class boards, which was, on December 28, 1897, seized under the attachments of other creditors, and there was no testimony to show, or tending to show, that the plaintiff got any less for said lumber than it would have received had no attachment been levied, or to show that the lumber deteriorated while in the Sheriff's possession, or was injured in any way, and it was established by the evidence that the price of lumber improved after October 1, 1897; that there was shipped from the mill in October, 1897, 1,510,750 feet of lumber; 2,658,284 feet in November, and 950,324 feet in December." (Rec., 186.)

"And there was evidence tending to show that for the lumber shipped in October plaintiff received $14,055.74, for that shipped in November $22,846.57, and for that shipped in December $2,483.63." (Rec., 201.)

At another place the record recites—

"That the defendant, prior to December 28, 1897, sold all of the lumber which it had on hand December [October] 1st, and which it subsequently manufactured, and had shipped the same away from the mill, except about 2,000,000 feet, which was, on the 28th day of December, 1897, seized under the writs of other creditors." (Rec., 185.)

It appears from this, that the plaintiff, prior to December 28th, had cleaned up everything except the 2,000,000 feet of old stuff, and converted it into money. That the total quantity of lumber sold, including that manufactured from the logs on hand October 1st and from the logs subsequently purchased, was 5,120,358 feet of lumber. This is definite. And that the amount of money received for this total was $39,385.94. There is no evidence to show what was realized from the

2,000,000 feet of old stuff levied on by other creditors, or to show that anything was received for it.

From this $39,385.94 is to be deducted the cost of the 400,000 feet of logs subsequently purchased, and the cost of operating the mill after October 1, 1897, and other expenses of which there is no record.

The plaintiff proved that the mill was worth from $5,000 to $75,000, according as a person had use for it. (Rec., 87.)

And the testimony shows that it was sold at execution sale in February, 1899, for $2,300, to Henry Weiler, as trustee for Charles L. Bucki. (Rec., 73.)

The cost of plaintiff's mill was incompetent evidence.

City of Kansas vs. Frohwerk, 10 Kansas Appeals Reports, 120.

And its value after the cancellation of the log contract was entirely dependent upon finding a person with both the inclination and necessary capital to embark in the sawmill business.

Stockton tried a lease, and lost $18,000 in one year. (Rec., 188.)

Plaintiff admits, at page 45 of its brief, that the plaintiff applied the proceeds of this lumber to the payment of its debts, and it appears that after all the lumber had been sold, except the 2,000,000 feet of old stock attached by other creditors, and presumably after these proceeds had been applied to the payment of its debts, it still owed various creditors, for on February 22, 1898, it executed a mortgage on its mill plant to secure various debts, including a debt of $25,000, to one Henry Weiler, a director in the company (Rec., 204), and on that day it still owed the Atlantic Lumber Company over $8,000.

III.

THE MORTGAGE TO THE SURETY COMPANY.

At page 4 of plaintiff's brief it is stated that the plaintiff, on November 4th, gave to the Surety Company a mortgage on "all its timber, lumber and logs, aggregating over eight million feet," and upon its mill

plant, to secure the Surety Company against loss in the forthcoming bond.

The plaintiff has not, however, called attention to the fact that by the terms of the mortgage it was permitted to make sale of the logs and lumber in the ordinary course of business, the lien of the mortgage to apply to the proceeds. (Rec., 65.)

The defendant offered to prove that the plaintiff made use of the proceeds of this property without embarrassment (Rec., 185), and the plaintiff admits, in its brief, that it applied the proceeds to the payment of its debts (page 45 of plaintiff's brief). So it appears that this mortgage was a dead letter, in so far as the personal property was concerned. It neither affected the price for which the property was sold or embarrassed plaintiff in the use of the proceeds.

IV.

THE COST OF CONTINUING IN BUSINESS.

At page 57 of plaintiff's brief it is stated that "one Murphree testified for the defendant that to supply plaintiff's mill with logs would have required an investment of $150,000 to $250,000, including iron rails."

The plaintiff is not to be blamed for trying to lay the responsibility of this damning evidence on defendant's shoulders, but an inspection of page 87 of the record will show that plaintiff adduced this evidence, and by a leading question at that.

V.

THE JUDGMENT OF THE ATLANTIC LUMBER COMPANY.

It is stated, at page 7 of plaintiff's brief, that the judgment of the Atlantic Lumber Company for $8,000 has been adjudicated to be for $4,000 too much. It is true that the Circuit Court of Appeals has held that a bill in chancery will lie to review the rulings of the Circuit Court on a motion for a new trial, but this was

on demurrer to the bill of complaint, and the suit is still pending on answer to the bill.

This anomalous decision will be found in the case of L. Bucki & Son Lumber Co. vs. Atlantic Lumber Co., 116 Fed. Rep.

VI.

THE MERITS OF THE ATTACHMENT SUIT FOR $75,000.

Counsel for the Bucki Company has devoted considerable space to the discussion of the subject of attachment for unliquidated damages. Neither this subject nor any other relating to the merits of that attachment is now before the Court. It is sufficient that it was dissolved. The Circuit Court, however, after full discussion, held that an attachment for unliquidated damages arising out of this contract, could be maintained—as the contract furnished an exact standard of admeasurement.

Respectfully submitted.

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Counsel.